RAMASAMY SHANMUGAM

v.

THE STATE GOVERNMENT OF PENANG & ANOR.

SUPREME COURT, KUALA LUMPUR
MOHD. AZMI SCJ
[CIVIL APPLICATION NO. 17 OF 1985]
20 JANUARY 1986

CONSTITUTIONAL LAW: *Hindu Endowments Ordinance 1906 - Validity - Pre-Merdeka legislation - State or Federal law - Articles 3, 11, 12, 74, 75, 160, 162 of the Federal Constitution - Whether the present application is within the ambit of art. 4 of the Federal Constitution - Article 128 - Exclusive original jurisdiction of the Supreme Court.*

The applicant, a Hindu by religion, made an application for leave under Article 4 Clause 4 of the Federal Constitution to commence proceedings in the Supreme Court for a declaration that the Hindu Endowments Ordinance 1906 (Straits Settlement Cap. 175) was invalid and void and an order for consequential relief. The Court dismissed this application for leave under Article 4 Clause 4 and the reasons for doing so are hereby given.

The applicant contends that the Mohammedan and Hindu Endowments Ordinance came into force on 1 January 1906. Insofar as it affects Muslim endowments, the Ordinance was repealed in the State of Penang Legal Notification No. 4 dated 23 February 1967 and since that date, the statute is only known as the Hindu Endowments Ordinance (hereinafter referred to as the "said Ordinance"). The applicant further contends that by virtue of Article 74(1) and item 15(c) of the Federal List in the Ninth Schedule to the Federal Constitution. Parliament may make laws in respect of Hindu endowments but there is no provision in the Constitution of the State of Penang for the State Legislature to enact laws pertaining to the practice or propagation of the Hindu religion. It is therefore argued that the said Ordinance is anachronistic and unconstitutional and ceases to be in force on or after Merdeka Day. Further it is argued since the State Legislature has no power to enact laws pertaining to religions other than Islam; the said Ordinance is inconsistent with Articles 3, 11 and 12 of the Federal Constitution and is void pursuant to Article 75.

Both the State Legal Adviser, Penang (for the 1st respondent) and the Senior Federal Counsel (for the 2nd Respondent, The Government of Malaysia) submitted that the present application does not come within the ambit of Articles 4(3) and (4) of the Federal Constitution.

Held:

[1] The said Ordinance, being a Straits Settlement Ordinance, is a pre-Merdeka law. Under items 74 and 78 of the Second Schedule to the Federation of Malaya Agreement 1948, the said Ordinance became a federal law although the exercise of executive authority of the Ordinance could be conferred on a state to the extent permitted by the second column of the Schedule. On Merdeka Day, the federal status of the said Ordinance was extended by Article 162(1) read with Article 160. It is therefore abundantly clear that both immediately before and after Merdeka Day the said Ordinance has always been a federal law, and the said Ordinance being an "existing law" should in accordance with Article 162(1) continue to be in force on and after Merdeka Day.

[2] On the issue of the submissions by the Senior Federal Counsel and State Legal Adviser, Penang, the relevant clauses are in Article 4 and 128. The exclusive original jurisdiction of the Supreme Court under Article 128(1)(a) read with Article 4(3) and (4) must be strictly

construed - see *Rethana v. Government of Malaysia* [1984] 2 MLJ 52. The proceedings for a declaration that a law is invalid referred to in the two Articles of the Constitution relate only to the validity of any law made by Parliament or the Legislature of any state, which by statutory definition must refer to law enacted after Merdeka Day. The said Ordinance, although a federal law since 1948, is a pre-Merdeka legislation and therefore cannot come within the ambit of Article 4(3) and (4) and Article 128(1)(a) (see *Assa Singh v. Menteri Besar Johor* [1969] 2 MLJ 30). The present application therefore should not have been brought to the Supreme Court as a Court of first instance.

[Notice of motion dismissed.]

Cases referred to:
Rethana v. Government of Malaysia [1984] 1 CLJ 323
Assa Singh v. Menteri Besar Johor [1969] 2 MLJ 30

Legislation referred to:
Courts of Judicature Act 1964, s. 47
Delegation of Powers Ordinance 1946, s. 3
Federal Constitution, arts. 3, (2), 4(3), (4), 11, 12, 74(1), (2), 75, 128, (1)(a), 160, (6), 162, (1)
Hindu Endowments Ordinance 1906 (Straits Settlement Cap 175) s. 3
Administration of Muslim Law Enactment (Penang) 1959, s. 172(1)
Transfers of Powers Ordinance 1948, s. 4(d)

For the applicant - V.Muthusamy; M/s. V.Muthusamy & Co.
For the 1st respondent - Mohd. Shaari bin Yusoff; State Legal Adviser, Penang
For the 2nd respondent - T. Selventhiranathan; SFC

JUDGMENT

Mohd. Azmi SCJ (sitting alone):

When dismissing the application for leave under Article 4 Clause 4 of the Federal Constitution, I indicated that I would state my reasons. I now proceed to do so.

The applicant, a Hindu by religion is the vice-chairman of the Hindu Sangam, Seberang Perai, Penang. His application is for leave to commence proceedings in the Supreme Court for three declaratory orders and one order for consequential relief. Mr. V. Muthusamy, Counsel for the applicant has however withdrawn two of the prayers in the notice of motion leaving only the following two prayers:

(1) a declaration that the Hindu Endowments Ordinance 1906 (Straits Settlement Cap. 175) is invalid and void;

(2) such further or other relief or consequential relief.

By his affidavit affirmed on 16 August 1985, the applicant averred that the Mohammedan and Hindu Endowments Ordinance 1906 came into force on 1 January 1906. The Ordinance was enacted by the British Colonial Government of the Straits Settlement of Penang and Malacca to administer Mohammedan and Hindu religious and charitable endowments. Insofar as it affects Muslim endowments, the Ordinance was repealed in the State of Penang by the Muslim and Hindu Endowments Ordinance (Repeal) Proclamation 1967 vide Penang Legal Notification No. 4 dated 23 February 1967, and since that date the statute is known only as Hindu Endowments Ordinance. By Article 74(1) and item 15(c) of the Federal List in the Ninth Schedule to the Federal Constitution, Parliament may make laws in respect of Hindu endowments, but there is no provision in the Constitution of the State of Penang for the State Legislature to enact laws pertaining to the practice or propagation of the Hindu religion.

It is therefore argued that the Ordinance is anachronistic and unconstitutional and ceases to be in force on or after Merdeka Day. Further, since the State Legislature has no power to enact laws pertaining to religion other than Islam, the Ordinance is inconsistent with Article 3, 11 and 12 of the Federal Constitution and is void pursuant to Article 75 which provides that, "If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void."

From the above averment, it is manifestly clear that the applicant's argument on the unconstitutionality of the Ordinance is based on the assumption that the Ordinance (SS Cap 175) is a State law, as there is no question that Parliament and not the Legislature of the State of Penang is competent to legislate law on "Hindu Endowments" under item 15(c) of the Federal List in the Ninth Schedule to the Federal Constitution. Now, SS Cap 175 being a Straits Settlement Ordinance is a pre-Merdeka law. Indeed it is already in existence even before the Federation of Malaya Agreement 1948. Under items 74 and 78 of the Second Schedule to the 1948 Agreement, SS Cap 175 the subject matter of which concerned Hindu Endowment Board, charities and charitable institutions, became a federal law, although the exercise of executive authority of the Ordinance could be conferred on a state to the extent permitted by the second column of the Schedule. Thus, vide Legal Notification No. 152 dated 7 April 1949 in exercise of the powers conferred by s. 3 of the Delegation of Powers Ordinance 1946 and vested in him by virtue of s. 4(d) of the Transfers of Powers Ordinance 1948, the then High Commissioner delegated to the Resident Commissioner of Penang and Malacca the exercise, within their respective settlements, of the powers conferred on the High Commissioner by the provision of s. 3 of SS Cap 175. Consequently, from 7 April 1949 the executive powers conferred by s. 3 of the Ordinance was transferred to the state, although the Ordinance itself remained a federal law. This transfer of executive power to the state is in accordance with Clause 18 of the Federation of Malaya Agreement which states:

> Notwithstanding anything in this Agreement, the High Commissioner may entrust, either conditionally or unconditionally, to the Government of any Malay State with the consent of His Highness the Ruler of that State, or to the Government of a settlement, or to their respective officers, functions in relation to any matter to which the executive authority of the Federation extends.

On Merdeka Day, the federal status of the Ordinance is extended by Article 160. These two provisions state:

> **Article 162(1)**: Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by federal or State law.
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> **Article 160:** "Existing law" means any law in operation in the Federation or any part thereof immediately before Merdeka Day.

After Merdeka Day, the Islamic contents of the Ordinance, being a state matter under the State List of the Ninth Schedule to the Federal Constitution, and to bring the Ordinance into accord with Article 3 and Article 74(2), His Majesty the Yang di-Pertuan Agong as Head of the Islamic religion in Penang under Article 5 of the State Constitution and Article 3(2) and (3) of the Federal Constitution, amended the Ordinance by proclamation vide Penang Legal Notification No. 4 of 1967 referred to earlier. The proclamation was promulgated by the Agong under s. 172(1) of the Administration of Muslim Law Enactment 1959 of the State of Penang after consultation with the Governor in Council, and it repealed SS Cap 175 insofar as it affects endowments given or to be given for the support of any Muslim mosque or shrine

or school or for other Muslim pious, religious, charitable or beneficial purpose. It is therefore abundantly clear that both immediately before and after Merdeka Day the Ordinance has always been a federal law, and the Ordinance being an 'existing law' should in accordance with Article 162(1) continue to be in force on and after Merdeka Day. On these grounds alone, I am satisfied that the present application has no merit whatsoever and the notice of motion for leave should accordingly be dismissed.

There is one further aspect of this application which requires consideration. It is the submission of Mr. T. Selventhiranathan, Senior Federal Counsel, appearing for the Government of Malaysia that the present application does not come within the ambit of Article 4(3) and (4) of the Federal Constitution. In his submission which is also adopted by Encik Shaari, State Legal Adviser Penang, he emphasises that this is the first time the validity of a pre-Merdeka legislation is being challenged under Article 4. The relevant clauses in Article 4 and Article 128 are in the following terms:

> 4(3): The validity of **any law made by Parliament or the Legislature of any State** shall not be questioned on the ground that it makes provision with respect to any matter with respect to which **Parliament** or, as the case may be, **the Legislature of the State** has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or-
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> (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
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> (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.
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> **Article 4(4):** "Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within para. (a) or (b) of the Clause) shall not be commenced without the leave of a Judge of the Supreme Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under para. (a) or (b) of the Clause.
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> **Article 128(1)(a)**: "The Supreme Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of Court regulating the exercise of such jurisdiction, any question whether **a law made by Parliament or by the Legislature of a State** is invalid on the ground that it makes provision with respect to a matter with respect to which **Parliament** or, as the case may be, the **Legislature of the State** has no power to make laws.
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> (emphasis supplied)

In my opinion the exclusive original jurisdiction of the Supreme Court under Article 128(1)(a) read with Article 4(3) and (4) must be strictly construed (see *Rethana v. Government of Malaysia* [1984] 1 CLJ (Rep) 323). The proceedings for a declaration that a law is invalid referred to in the two Articles of the Constitution relate only to the validity of any law made by Parliament or the Legislature of any state, which by statutory definition must refer to law enacted after Merdeka Day. Such proceedings for a declaration as to the invalidity of any law under Article 4(4) read with Article 128(1)(a) must be limited to any law "with respect to which Parliament or as the case may be, the Legislature of the State has no power to make laws". Firstly, both Article 4(3) and Article 128(1)(a) do not employ the words "federal law" or "state law", but they expressly refer to "law made by Parliament" and "law made by the Legislature of a State". Secondly, the definition of "federal law" and "state law" under Article 160 clearly makes a distinction between existing federal and state law whose continuity of operation is being accommodated under Part XIII of the Constitution (i.e., pre-Merdeka

legislation) and any Act of Parliament or a law made by the Legislature of a state (i.e., post-Merdeka legislation). SS Cap 175 though a federal law since 1948, is a pre-Merdeka legislation and therefore cannot come within the ambit of Article 4(3) and (4) and Article 128(1)(a). The Ordinance, not being a law legislated by Parliament or the Legislature of a state does not come within the exclusive original jurisdiction of the Supreme Court for the purpose of adjudication on its validity as envisaged by Article 128(1)(a) read with Article 4(4). The architect of our Constitution recognised that not all pre-Merdeka Day legislation could readily be slotted into the three newly established compartments of legislative powers as provided in the Ninth Schedule, and nor were all such legislation expected to be prophetically consistent with the provisions of the Federal Constitution as required in the case of law passed after Merdeka Day by Article 4(1). Accordingly, various provisions are introduced in Article 162 of Part XIII of the Constitution for modification of 'existing law' to enable them to continue in operation after Merdeka Day. As alluded to earlier such 'existing law' is constitutionally defined as "any law in operation in the Federation or any part thereof immediately before Merdeka Day". Article 160(6) even empowers any Court or tribunal to apply the provision of any existing law which has not been modified on or after Merdeka Day, provided it is applied with such modifications as may be necessary to bring it into accord with the provisions of the Constitution. Thus in *Assa Singh v. Menteri Besar Johor* [1969] 2 MLJ 30, Ong Hock Thye CJ (Malaya) in accepting the argument of Salleh Abas Solicitor General (as he then was) had this to say at p. 35 with reference to Restricted Residence Enactment as a pre-Merdeka legislation: "In the third place, I agree that, since Article 4 speaks only of laws passed after Merdeka Day, the validity or otherwise of the pre-Merdeka Restricted Residence Enactment will have to be considered solely by reference to Article 162." This point is summed up most admirably by the learned Solicitor-General as follows:

> As to post-Merdeka law, the Constitution is Supreme and if any of that law is inconsistent with the provisions of the Constitution, to the extent of such inconsistency that law shall be void - article 4(1). But as regards pre-Merdeka law, such law shall continue to be in force until repealed; in the meantime its continuity and enforceability is subject to modification, firstly by a Legislative Act or Enactment or, secondly, by process of judicial interpretation, the executive order of the Yang di-Pertuan Agong to modify the same having expired - article 162(1) and (6). It must be noted that Article 162 does not use the expression that the pre-Merdeka law shall be void to the extent of the inconsistency but, instead, it expressly states that the law shall continue to be in force.

In the circumstances, I am of the opinion that proceedings for a declaration under Article 4(4) read with Article 128(1)(a) applies only to post-Merdeka law whether federal or state. Since S.S. Cap 175 is a pre-Merdeka law the present application should not have been brought to the Supreme Court as a Court of first instance.

The notice of motion is accordingly dismissed and because of s. 47 Courts of Judicature Act 1964, I make no order as to costs.

Also found at [1986] 2 CLJ 121